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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIC MARSHALL,

Defendant and Appellant.

B214231

(Los Angeles County
Super. Ct. No. TA089045)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary R. Hahn, Judge. Affirmed.

David McNeil Morse, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Eric Marshall was charged with one count of murder and one count of assault with a firearm. The murder and assault were unrelated but were consolidated in a single trial. In connection with the murder charge, extensive gang evidence was admitted to establish a gang-enhancement allegation under Penal Code section 186.22.¹ No gang enhancement was alleged in connection with the assault, but limited gang evidence was admitted to establish that Marshall's acquaintance, Erica Cotton, who was present during the assault, was a fellow gang member. On appeal, defendant contends that gang evidence concerning Cotton should have been excluded under Evidence Code section 352. We disagree and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

A. *The prosecution's case.*

In 2003, Erica Cotton ran her car into Mario Oraguna's car, and she fled the scene. He sued her and she was ordered to pay about \$3,000 for the damage to Oraguna's car. She never paid. Thereafter, on December 4, 2005, Oraguna saw Cotton while they were driving their cars. He asked her to pull over, and she indicated that he should follow her. She led him to Marshall's house, and Oraguna noticed that she was on her cell phone. Oraguna asked Cotton where was his money. Marshall pointed a gun at Oraguna and told him to leave or he would " 'smoke' " him. Marshall kicked Oraguna's door.

Marshall, a member of the 190 East Coast Crips, told Timothy Gaines, a fellow gang member, that Cotton had been in a hit and run. She went to Marshall's house and he pointed a ".45" gun on a Hispanic man.

¹ All further undesignated statutory references are to the Penal Code.

Detective Mark Wedel testified that in his opinion Cotton was also a member of the 190 East Coast Crips.² She admitted her membership to him and he had investigated several cases involving her. Cotton was known as D-Crazy.

II. Procedural background

On April 4, 2008, the jury found Marshall guilty of count 2, assault with a firearm (§ 245, subd. (a)(2)). The jury found true a gun-use allegation (§ 12022.5). The jury hung on count 1 for murder.

Thereafter, on September 24, 2008, the parties entered into a plea bargain. The information was amended to add count 3, attempted murder (§§ 187, 664) with gun (§ 12022.53, subd. (c)) and gang (§ 186.22, subd. (b)(1)(C)) allegations, and count 4, voluntary manslaughter (§ 192, subd. (a)) with a gang allegation (§ 186.22, subd. (b)(1)(C)).

Marshall pleaded no contest to the newly added counts 3 and 4. On December 17, 2008, in accord with the plea agreement, Marshall was sentenced to nine years on count 3 plus twenty years for the gun-use enhancement. On count 2, he was sentenced to one year (one-third the midterm), plus one year, four months for the gun-use enhancement. On count 4, he was sentenced to a concurrent six years plus ten years for the gang enhancement.

DISCUSSION

I. The trial court did not abuse its discretion by admitting gang evidence concerning Cotton.

Marshall does not challenge the gang evidence insofar as it was admitted in connection with the murder charge. He instead contends that evidence of Cotton's gang membership should have been excluded under Evidence Code section 352. We disagree.

² Defense counsel objected to this evidence under Evidence Code section 352.

Evidence is relevant if it has a tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code, § 210.) The test of relevance is whether it “tends ‘logically, naturally, and by reasonable inference’ to establish material facts such as identity, intent, or motive.” (*People v. Garceau* (1993) 6 Cal.4th 140, 177, disapproved on another ground by *People v. Yeoman* (2003) 31 Cal.4th 93, 117.) “Gang evidence is admissible if it is logically relevant to some material issue in the case other than character evidence, is not more prejudicial than probative, and is not cumulative. [Citations.] . . . [¶] However, gang evidence is inadmissible if introduced only to ‘show a defendant’s criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense. [Citations.]’ [Citations.] In cases not involving a section 186.22 gang enhancement, it has been recognized that ‘evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.]’ [Citations.] Even if gang evidence is relevant, it may have a highly inflammatory impact on the jury. Thus, ‘trial courts should carefully scrutinize such evidence before admitting it. [Citation.]’ [Citations.]” (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192-193.)

In a case not involving a gang-enhancement allegation, gang evidence may nonetheless be relevant to, and admissible regarding, the charged offense. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) “Evidence of the defendant’s gang affiliation—including evidence of the gang’s territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime.” (*Ibid.*) A trial court’s admission of evidence, including gang testimony, is reviewed for abuse of discretion. (*People v. Brown* (2003) 31 Cal.4th 518, 547.) The trial court’s ruling will not be disturbed in the absence of a showing it exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9.)

Here, a gang allegation was not attached to the assault with a firearm count.³ The defense theory regarding the assault was that Oraguna chased Cotton, and Marshall defended her. The prosecutor, however, argued that Cotton deliberately led Oraguna to Marshall's house so that Marshall could assault him. Evidence that Cotton belonged to the same gang as Marshall explained why Cotton would lead Oraguna to Marshall's house. That Cotton and Marshall were members of the 190 East Coast Crips was relevant to establish this motive for the crime, and we therefore cannot agree that the evidence should have been excluded under Evidence Code section 352. And although we do not reach the issue of prejudice because we conclude that there was no error in admitting the gang evidence, we note that the gang evidence concerning Cotton was extremely limited, especially in comparison with the extensive gang evidence the jury heard in connection with the murder charge, which included testimony from Marshall's fellow gang members implicating him in the gang and in the murder.

³ A magistrate dismissed a gang-enhancement allegation as to count 2 at the preliminary hearing. At trial, the prosecutor argued that Cotton was a member of the same gang as Marshall, and that her gang membership therefore established motive for the crime, countering the defense theory that Oraguna was chasing Cotton. The defense argued that the evidence was more prejudicial than probative, and noted that there was no gang allegation connected to the assault charge. The trial court ruled that the evidence was admissible.

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.